FILE COPY

Office Supreme Court, U.
FILED
MAR 14 1933
CHARLES ELMORE CROP
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 685

THE STATE OF SOUTH CAROLINA, PETITIONER,

vs.

RAY BAILEY, ALIAS RAY KEITH.

BRIEF FOR RAY BAILEY, RESPONDENT.

CLYDE R. HOEY,
G. D. BAILEY,
DAN K. MOORE,
CHARLES HUTCHINS,
Attorneys for Ray Bailey, Respondent.

INDEX

Subject Index.

Brief for respondent in opposition to petition for certiorari:	Page
Statement of the case	1
Argument	5
Addenda. Opinion of the Supreme Court of North Carolina	14

Table of Cases Cited.

Bailey, In re, 203 N. C. 503, 166 S. E. 166	11
Biddinger v. Commissioner of Police of the City of New York, 245 U. S. 135, 62 L. Ed. 199	7
Hubbard, In re, 201 N. C. 472	11, 20
Hyatt v. New York ex rel. Corkran, 186 U. S. 692	8, 21
Innes v. Tobin, 240 U. S. 127, 60 L. Ed. 562	7
Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 52 L. Ed. 125	7
Munsey v. Clough, 196 U. S. 364, 49 L. Ed. 515	8, 21
Oteiza y Cortes v. Jacobus, 136 U. S. 328	11

Statutes Cited.

Constitution of the United States, Article 4, Sec. 2 (2)	6
Consolidated Statutes of North Carolina, Sec. 2234	9, 14, 19, 21
Public Laws of North Carolina (1931), Chap. 124 (Consolidated Statutes, Sec. 4556 (I))	10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 685

THE STATE OF SOUTH CAROLINA, PETITIONER,

vs.

RAY BAILEY, ALIAS RAY KEITH.

BRIEF FOR RAY BAILEY, RESPONDENT.

Statement of the Case.

A warrant was issued in Greenville, South Carolina, charging Ray Bailey with complicity in the murder of A. B. Hunt, at Greenville, S. C., on May 1st, 1932. The Governor of the State of South Carolina made requisition on the Governor of North Carolina, and on May 9th, 1932, the Governor of North Carolina issued a warrant of extradition for the arrest of Ray Bailey, who was then in a hospital in Sylva, North Carolina, seriously injured from gunshot wounds. Ray Bailey was arrested on June 7th, 1932, by the

Sheriff of Jackson County, North Carolina, upon the warrant of extradition issued by the Governor of North Carolina and Bailey immediately applied for a writ of *habeas corpus,* which was granted by Walter E. Moore, a judge of the Superior Court of North Carolina. A hearing was held upon said writ at Sylva on June 27th, 1932, and, after the introduction of evidence by both sides and the argument of counsel, Judge Moore discharged Ray Bailey and entered judgment, as appears in the record, in which he found that Bailey was not a fugitive from justice in South Carolina.

Thereafter the State of South Carolina applied to the Supreme Court of North Carolina and obtained a writ of certiorari and this cause came for hearing before the Supreme Court of North Carolina and was heard upon the full record of the case and, after argument by counsel, the court filed an opinion in this case on October 26th, 1932, which appears in 203 N. C., page 363, and which opinion is printed in full in the addenda to this brief. In this opinion the Supreme Court of North Carolina affirmed the judgment theretofore rendered by Judge Moore.

The record in this case will disclose that Policeman Hunt was killed at Greenville, S. C., at 10:30 o'clock on the night of May 1st, 1932, and three witnesses testified that they recognized Ray Bailey as being present in Greenville, S. C., at the time of the shooting and that he was actively participating with others in the shooting.

It further appears from the evidence, as printed in the record, that these same witnesses identified three

other men from North Carolina, being two of the brothers of Ray Bailey, and a school teacher named Osborne Briggs, as being present and participating in the shooting of Hunt, and that these men were all arrested and warrants of requisition issued by the Governor of South Carolina upon the Governor of North Carolina, and warrants of extradition issued by the Governor of North Carolina, and these three men, to wit, Reece Bailey, Vernon Bailey and Osborne Briggs, were all arrested by the officers in North Carolina. Upon their arrest they made application for writs of *habeas corpus* and each case was heard before Judge Hoyle Sink, a judge of the Superior Court of North Carolina, at Asheville, N. C., and all of them discharged. In the case of Osborne Briggs it was shown by twenty-five people that he lived in Yancey County, N. C., 100 miles away from Greenville, and had never been in Greenville, S. C., in his life, and the evidence was so overwhelming as to all three of these men that the State of South Carolina abandoned entirely the effort to remove them to South Carolina for trial. Yet witnesses Corea and Singleton, the officers who identified in the instant case Ray Bailey, also identified these three men and swore as positively about their presence in South Carolina as they swore about the presence of Ray Bailey.

Ray Bailey was able to prove before Judge Moore in the *habeas corpus* hearing by a large number of disinterested witnesses that he was in Yancey County, North Carolina, on the night of May 1st, 1932, from 8 until 12 o'clock. This point was 100 miles distant from

Greenville, where Hunt was shot. Bailey was able to show that he was shot by Howell Wilson in an altercation over a card game and at least seven creditable witnesses testified to his presence in North Carolina at the very time that Hunt was being shot in Greenville, S. C. As an indication to the Court of the character of this testimony, the affidavit of Sinclair B. Conally (page 11, Record) shows that he is Dean in Biltmore College at Asheville, N. C., and that Ray Bailey, who is a young man about 21 years of age, and who had been under his tutorage in the college for the preceding six months, was seen by Conally between 10 and 11 o'clock on the night of May 1st, 1932, and they engaged in conversation, so that there could be no possibility of a mistake as to identity. The other six witnesses were just as positive as to identification of Bailey.

Each of the three witnesses from South Carolina who testified to the presence of Bailey in Greenville on the night of the shooting admitted that they had never seen Bailey before, did not know him, and the only opportunity they had to see him was while the shooting was going on, which lasted only a few seconds, and this was their only basis of identification. They did not testify as to where the person was shot until after they had visited the hospital at Sylva and observed where Bailey was shot, so they could very easily describe the wounds after they had observed them on Bailey.

A thorough reading of the record of the testimony offered will show that it was clear, strong, convincing and conclusive in favor of the findings made by Judge

Moore, as appears in his judgment, and the Judge had the opportunity to pass upon the credibility of the witnesses, their opportunity for knowing Bailey and the circumstances attendant upon the giving of their testimony and, after a full hearing of the entire matter, Judge Moore found the following facts:

1. That Ray Bailey (*alias* Ray Keith) is a citizen and resident of North Carolina.

2. That he is not a fugitive from justice from the State of South Carolina and was not present at the time of the commission of the alleged crime at Greenville, S. C.

There were other findings in the judgment, but these are the material ones and, upon these findings, the Judge discharged Ray Bailey, and the Supreme Court of North Carolina, upon appeal, affirmed that judgment.

Argument.

The opinion rendered by the Supreme Court of North Carolina on October 25, 1932, in this case presents clearly the legal principles involved and we maintain correctly interprets the law applicable to this case. This decision is in harmony with the decisions of the Supreme Court of North Carolina and in harmony with the majority view of the courts throughout the country, including the Supreme Court of the United States.

It has been the general doctrine in North Carolina, as it is the general doctrine throughout the United States, that extradition of a citizen from one state to another must be predicated upon the ground that he

is a fugitive from justice in the demanding state. The provision of the United States Constitution, Article 4, Section 2, and clause 2, reads as follows:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

The gist of the foregoing provision of the Federal Constitution is that the person sought to be extradited is a fugitive from justice and this is recognized everywhere as a prerequisite to the right of extradition.

It certainly cannot be contended, in the light of all the decisions, that the mere issuing of a warrant in the demanding state and the requisition by the Governor of that state, and the issue of a warrant of extradition by the Governor of the asylum state, and the arrest of the person sought to be extradited, is sufficient *ipso facto* to transfer the person so arrested to the demanding state if this person elects to sue out a writ of *habeas corpus*. When that course is pursued, then it devolves upon the demanding state to satisfy the tribunal hearing the writ of *habeas corpus* that the person arrested and sought to be extradited is a fugitive from justice from the demanding state. Upon the failure of that state to so satisfy the court, then the person is entitled to discharge from arrest. The writ of *habeas corpus* furnishes the means and the occasion

for the person improperly arrested to show to the court that he is not a fugitive from justice and if that fact shall be established, then it is not only the right but the duty of the court to discharge him from custody.

This view is presented and discussed in the case of *Innes* v. *Tobin*, 240 U. S., page 127, and 60 Law Ed., page 562, where it is stated:

> "The surrender of a person in one state for removal to another as a fugitive is expressly or by necessary implication prohibited by the U. S. Rev. Stat. — 5278 Comp. Stat. 1913, — 10,126, where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding state."

In the case of *Biddinger* v. *Commissioner of Police of the City of New York*, 245 U. S., page 135; 62 Law Ed. 199, Mr. Justice Clark, writing the opinion of the court, says:

> "* * * that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this Court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime was alleged to have been committed. * * *"

Mr. Justice Harlan, writing the opinion of the court in *Illinois ex rel. McNichols* v. *Pease*, 207 U. S., page 100, 52 Law Ed. 125, discusses at length the right to review extradition proceedings under the writ of *habeas corpus* and lays down seven principles which

may be deduced from a number of cases therein cited, and the seventh and last principle is as follows:

> "One arrested and held as a fugitive from justice is entitled, of right, upon *habeas corpus*, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

The case of *Hyatt* v. *New York ex rel. Corkran*, 186 U. S. 692, holds clearly that "one who was not within a state when the crime of larceny or false pretense, if ever, committed therein, cannot be deemed a fugitive 'from justice' within the meaning of U. S. Revised Statutes, Section 5278, providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled." This opinion further lays down the doctrine that "an extradition warrant issued by the Governor of a state is but *prima facie* sufficient to hold the accused; and it is open to him to show on *habeas corpus*, by admission or by other conclusive evidence, that the charge upon which his extradition is demanded assumes his absence from the demanding state at the time the crime was, if ever, committed."

The petitioner cites and relies upon the case of *Munsey* v. *Clough*, 196 U. S. 364; 49 Law Ed. 515, which is easily distinguishable from the case at bar, in that,

in the Munsey case, the accused refused to introduce evidence upon the question whether she was in fact a fugitive from justice and left the case for decision upon the papers before the Governor, upon which he acted in issuing the warrant of arrest. The court holds that the papers in that case made out a *prima facie* case and that the accused having waived any right to give further evidence, was concluded by that *prima facie* case. An entirely different state of facts exists in the case at bar where the accused was accorded the opportunity to offer evidence that he was not a fugitive from justice, and this evidence was offered and a Court of competent jurisdiction found as a fact that he was not a fugitive from justice.

Both the Constitution and statute law of North Carolina provide for the issue of the writ of *habeas corpus*, and Section 2234 Consolidated Statutes of North Carolina regulate the proceedings upon the return of the writ as follows:

> "The court or judge before whom the party is brought on a writ of *habeas corpus* shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the

> allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party."

Chapter 124, Public Laws of 1931 of North Carolina, now Section 4556 (I) of the Consolidated Statutes, provides the method by which a person accused may apply for writ of *habeas corpus* as follows:

> "No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this State, who shall fix a reasonable time to be allowed him within which to apply for a writ of *habeas corpus*. And when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding State."

One who is sought to be extradited may contest the validity of the extradition proceedings on writ of *habeas corpus* by showing:

(1) That he is not charged with a crime in the demanding state, or

(2) That he is not a fugitive from the justice of the demanding state.

Both of these are jurisdictional matters, and, if the accused can establish either, he is entitled to be discharged from custody. The first is a question of law to be determined upon the face of the requisition and indictment or affidavit accompanying it, the law of the demanding State of course furnishing the test; while the second is a question of fact which, when controverted, may be established by evidence like any other disputed fact.

196 N. C. 662.
146 S. E. 599, 601.
In re Hubbard, 201 N. C. 472.
160 S. E. 569.

Under the law of North Carolina the judge of the Superior Court is charged with the duty and responsibility of hearing the evidence and finding the facts and his finding of facts is conclusive. In the case at bar the judge heard the evidence upon the question of whether or not Ray Bailey was a fugitive from justice. He found the facts and upon his finding of facts he predicated his judgment. The Supreme Court of North Carolina uniformly holds that the findings of fact by the judge, if there is any competent evidence upon which to base the findings, are conclusive and binding, and this seems to be the general doctrine both with State and Federal courts.

In re Bailey, 203 N. C. 363.
166 S. E. 166, 167.
Oteiza y Cortes v. *Jacobus,* 136 U. S. 338.

Under the laws of North Carolina and the decisions of the Supreme Court of that State the accused, when arrested upon a warrant of extradition, is entitled to sue out a writ of *habeas corpus* and to have the matter determined as to whether or not he is a fugitive from justice. The law places this duty and responsibility upon a judge of the Superior Court, or one of the justices of the Supreme Court, and clothes the judge with the power, as it makes it his duty upon the hearing, to find the facts and determine the controverted question as to whether or not the accused is in fact a fugitive from the justice of the demanding State. There is nothing in the statute law or in the decisions of the courts of North Carolina in conflict with the Federal Constitution, or Federal Statutes, or the decisions of the United States Supreme Court. There must of necessity be some tribunal clothed with power to find the facts.

The sacred writ of *habeas corpus* would be rendered hollow and ineffective if, upon the hearing, the Judge should do no more than merely inspect the papers to see if they were in proper form and, as the Supreme Court of North Carolina says in the instant case, if that should be the rule, it would be possible for one witness to make a superficial identification of a person accused and have him carried a thousand miles away to a demanding state, when probably one hundred creditable witnesses could and would testify that he was not a fugitive from justice and was not even in the demanding state at the time the crime was committed. Unless the Judge has the power to find the facts, then

nothing would avail the accused and he would be removed to a distant state without either the power or the capacity to carry the necessary witnesses to that state to establish that he was not a fugitive from justice, and the rights of the citizen would be seriously infringed and the virtue of the writ of *habeas corpus* would be rendered null and ineffective.

The present case has proceeded in an orderly fashion with full opportunity to the petitioner to present its testimony before a Court of competent jurisdiction and that Court, charged with the duty and responsibility of passing upon the matter, has found the facts adverse to the petitioner and there is no substantial reason or ground for overruling the decision of the Supreme Court of North Carolina, which is printed in full in the Addenda to this brief.

Respectfully submitted,

RAY BAILEY,

Respondent,

By CLYDE R. HOEY,
G. D. BAILEY,
DAN K. MOORE,
CHARLES HUTCHINS,
Attorneys for Respondent.

ADDENDA.

Below is opinion rendered by the Supreme Court of North Carolina in full, including head notes, as follows:

In the Matter of RAY BAILEY, *alias* RAY KEITH.

(Filed 26 October, 1932.)

1. Extradition, B c.—Upon hearing of habeas corpus in extradition proceedings court must hear allegations and proof on controverted facts.

Where a writ of *habeas corpus* has been issued in extradition proceedings it is the statutory duty of the court, if an issue is raised concerning material facts, to "proceed in a summary way to hear the allegations and proof of both sides," and the words of the statute import more than a mere perfunctory or formal hearing. C. S., 2234.

2. Same.—Court may determine whether prisoner was in demanding state at time of crime upon issue of whether he is a fugitive from justice.

Upon the hearing of a writ of *habeas corpus* in extradition proceedings the hearing judge may determine from the evidence, when the fact is controverted, whether the prisoner was in the demanding state at the time of the commission of the crime upon the question of whether he is a fugitive from justice.

3. Same.—Appeal and Error, J c.—Judge hearing habeas corpus in extradition proceedings must determine disputed facts in his discretion.

Where upon a writ of *habeas corpus* in extradition proceedings it is controverted as to whether the

prisoner was in the demanding state at the time of the commission of the crime an issue of fact is raised for the determination of the hearing judge in his sound discretion, and his finding upon supporting evidence that the prisoner was not a fugitive from justice is conclusive on appeal.

4. Extradition, B a.—Upon finding that prisoner was not a fugitive from justice judgment releasing prisoner is correct.

Where on a hearing of a writ of *habeas corpus* in extradition proceedings the court finds upon supporting evidence that the prisoner was not a fugitive from justice and was not in the demanding state at the time of the commission of the crime, and releases the prisoner, the judgment speaks the mind of the judge, and is not affected by certain remarks of the judge in the record outside the judgment indicating that he decided the case from the standpoint of the guilt or innocence of the prisoner, and the judgment will be affirmed.

Habeas Corpus. Before Moore, J., 27 June, 1932. From Jackson.

On 5 May, 1932, a warrant was issued by a magistrate of Greenville County, South Carolina, charging that on 1 May, 1932, Ray Bailey alias Ray Keith, "did shoot, kill and murder one A. B. Hunt" in the town of Greenville, South Carolina. The Governor of South Carolina duly made requisition upon the Governor of North Carolina, and on 9 May, 1932, the Governor of North Carolina duly issued a warrant of extradition, requiring the arrest of said Bailey. Bailey was arrested on 7 June, by the sheriff of Jackson County, and thereupon applied for a writ of habeas corpus. The writ was issued by Moore, J., on 7 June, and was heard by him on 27 June, 1932. At the hearing it appeared that

Hunt had been killed in Greenville, South Carolina, at about 10:30 p. m. on the night of 1 May. A police officer of Greenville, South Carolina, who claimed to be present at the killing testified positively to the identification of Bailey, and further testified that, in the gun battle between Bailey and police officers, resulting in the death of Hunt, Bailey had been shot by police officers and seriously wounded in the hand and abdomen. Another police officer of Greenville, South Carolina, who claimed to be present at the shooting also positively identified Bailey as the man who killed Hunt. A merchant of Greenville, South Carolina, also identified Bailey as the slayer of Hunt.

Bailey offered evidence of many witnesses as to his whereabouts on the day of the killing, and further offered positive evidence from several disinterested witnesses that he was found shot down on the road between Burnsville and Asheville at about 10:30 o'clock on the night of 1 May. The place, where the testimony showed that he was found lying in the road seriously wounded, was approximately eighty-five miles from Greenville, South Carolina. The evidence for Bailey further tended to show that the persons who found him lying in the road seriously wounded carried him to Asheville and from thence he was then carried to a hospital at Sylva in Jackson County. Bailey testified that he had been shot by a companion on the night of 1 May, resulting from a quarrel over a poker game, and offered testimony of disinterested witnesses tending to corroborate his statement. Bailey denied that he was in South Carolina on the day of the crime or that he had been in the state for some time prior thereto, and contended that he was charged with the crime merely because he had been found in a hospital seriously wounded early the next morning. There was further evidence to the effect that police officers of South Carolina had arrested other members of the

Bailey family, charging them with the murder of Hunt, and positively identifying them as present at the killing, and that failing to offer at the hearing evidence of identity, they had all been discharged under writ of habeas corpus.

Bailey offered the evidence and affidavits of approximately twenty witnesses, and the State offered affidavits and testimony of twelve witnesses.

At the conclusion of the hearing the record shows the following: (By the Court) "Gentlemen, I think there has been an issue raised here, I don't think I have a right to pass on, that of identity, and at the same time I don't think it would be fair to the defendant to send him to South Carolina to stand a trial, as it would be very expensive to him and his folks; under the testimony I don't think there would be a jury anywhere that would ever find him guilty beyond a reasonable doubt. I shall, therefore, discharge him under the writ and let him go.

The respondents except to the rulings of the court and hereby give notice in open court of intention to appeal to the Supreme Court, and also gave notice in open court that respondents will make application to the Supreme Court for a writ of certiorari for the purpose of reviewing the record and rulings and findings of the court."

Thereafter a formal judgment was entered as follows:

"This cause coming on to be heard and the same being heard before the undersigned judge, resident of the 20th Judicial District of North Carolina, at Sylva, N. C., on 27 June, 1932, upon the petition and writ of habeas corpus in this cause, and it appearing to the Court that a fugitive warrant was issued for Ray Bailey, alias Ray Keith, and that thereafter the Governor of North Carolina, upon request of the State of South Carolina, issued warrant of extradition for

Ray Bailey, alias Ray Keith, and thereafter petition for writ of habeas corpus was sworn out by the said Ray Bailey, and writ of habeas corpus was thereupon issued, and the State of South Carolina appearing in court and being represented by Hon. J. G. Leatherwood, John M. Queen, solicitor of the 20 Judicial District, and D. D. Alley; and the State of South Carolina having introduced its evidence, and the defendant, Ray Bailey, having introduced evidence, all of which appears in the record;

Thereupon, the court finds as a fact:

1. That Ray Bailey (alias Ray Keith) is a citizen and resident of the State of South Carolina.

2. That he is not a fugitive from justice from the State of South Carolina, and was not present at the time of the commission of the alleged crime at Greenville, South Carolina.

3. That the State of South Carolina has failed to show probable cause for holding the said Ray Bailey in custody, or that he committed the alleged crime—the murder of A. B. Hunt, and has failed to produce sufficient evidence to warrant the court in refusing the writ, and the court finding from all the evidence introduced in this cause that the petitioner is entitled to the relief sought in his petition and the writ of habeas corpus;

It is, therefore, upon motion of Clyde R. Hoey, G. D. Bailey, Dan K. Moore and Charles Hutchins, attorneys for the petitioner, considered, ordered, decreed and adjudged by the court that the petition and writ be allowed and that the defendant be and he is hereby released from custody."

A petition was filed in the Supreme Court of North Carolina for a writ of certiorari to bring up the record, which was duly granted on 31 August, 1932, and the

record was duly certified by Judge Moore on 13 September, 1932.

John M. Daniel, Attorney-General of South Carolina, Cordie Page, Assistant Attorney-General of South Carolina, J. G. Leatherwood and Queen & Alley for demanding State.

Clyde R. Hoey, G. D. Bailey, Dan K. Moore and Charles Hutchins for petitioner.

Brogden, J. When a writ of habeas corpus has been issued to inquire into the legality of an arrest on a warrant of extradition, what is the function of the hearing judge and the legal effect of his findings of fact?

C. S., 2234, defines the duty of the judge before whom the writ is returnable, and also prescribes the scope of the hearing. He shall immediately (*a*) "examine into the facts contained in such return and into the cause of the confinement;

(*b*) "and if issue be taken upon the material facts * * * or other facts are alleged to show that the imprisonment * * * is illegal;

(*c*) "the * * * judge shall proceed in a summary way to hear the allegations and proofs on both sides;

(*d*) "and * * * do what to justice appertains, in delivering, bailing or demanding such part."

The statutory words "if issue be taken upon the material facts * * * the judge shall proceed in a summary way to hear the allegations and proofs of both sides," preclude the idea that such hearing shall be perfunctory and merely formal. This Court said, *In re Veasey*, 196 N. C. 662, 146 S. E. 599: "One who is sought to be extradited may contest the validity of the extradition proceedings on writ of *habeas corpus* by showing (1) that he is not charged with a crime in the demanding state, or (2) that he is not a fugitive

from the justice of the demanding state. Both of these are jurisdictional matters, and, if the accused can establish either, he is entitled to be discharged from custody. The first is a question of law to be determined upon the face of the requisition and the indictment or affidavit accompanying it, the law of the demanding state, of course, furnishing the test; while the second is a question of fact which, when controverted, may be established by evidence like any other disputed fact." See, also, *In re Hubbard*, 201 N. C. 472. All the authorities, including the decisions of this State, are to the effect that it is not proper to hear evidence upon the guilt or innocence of the prisoner or to take into consideration the merits of the case or of the defense to be interposed at the trial or of an alibi, or of other matters involving the ultimate issue of guilt. Nevertheless, these are general observations and legal assertions. If the petitioner was not in the demanding state when the crime was committed, certainly he could not be guilty of a crime, and hence it is obvious that the question of presence in the demanding state at the time of the crime involves in a certain sense guilt or innocence, alibi or other defenses that may be interposed at the trial. It is apprehended, however, that the courts mean to say that the bald question of presence in the demanding state at the time of the commission of the alleged crime was the primary question to be considered.

In arriving at a conclusion as to whether the prisoner should be remanded or discharged, a difficult question stands at the threshold. What question of proof shall the hearing judge require in order to determine the ultimate issue of facts as to whether the prisoner was in the demanding state at the time of the crime? It has been asserted that if the evidence is conflicting upon the subject of presence in the demand-

ing state at the time the crime was committed that the prisoner is not entitled to be discharged, but should be remanded for trial. It has also been said that if there is some evidence of the presence of the prisoner in the demanding state at the time the offense was committed, a discharge is not warranted or justified. See *Munsey* v. *Clough*, 196 U. S. 364, 49 L. Ed. 515; *Hyatt* v. *New York*, 188 U. S. 691, 47 L. Ed. 657. That is to say, that if there is more than a scintilla of evidence in favor of the demanding state, the judge should discharge the writ of *habeas corpus* and remand the prisoner. Hence, if any sort of reckless or fanciful testimony should be offered tending to show the presence of a prisoner in the demanding state, the accused might thereupon offer the testimony of a thousand disinterested persons who knew absolutely that he was not in the demanding state at the time, nevertheless the courts would be powerless to afford protection. Manifestly under such interpretation the beneficent powers of *habeas corpus* would be set at naught and the "hearing" provided by law would be no more than a hollow form or fleeting shadow. Nevertheless the demanding state is vitally interested in the outcome. It has the right to try and punish offenders against its peace and dignity, committed within its jurisdiction. Consequently a difficult task is imposed upon a judge in undertaking to decide the important question involved.

The statute of this State, C. S., 2234, enjoins the judge "to do what to justice appertains in delivering, bailing or remanding such party." Obviously the statute does not undertake to limit the judge in arriving at his conclusions, but apparently commits the result to the exercise of his sound legal discretion. The nearest approach to a positive declaration of this Court upon the quantum of proof is contained in *S.* v. *Herndon*, 107 N. C. 934, 12 S. E. 268. Upon the facts appearing

in the record the Court said: "If the judge, upon the investigation of the evidence on a petition for *habeas corpus*, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies, either in favor of the state or the petitioner. * * * The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed."

In the case at bar a controversy of fact arose between the contending parties, that is the demanding state and the prisoner, as to whether the prisoner was in the demanding state at the time the alleged offense was committed. The writ of *habeas corpus* was created and fashioned for the express purpose of determining such controverted fact. The statute and public policy require that such fact be determined in a summary manner. Doubtless in given cases different minds would work out diverse conclusions, but after all it is perhaps wise that the determination of the ultimate fact should be lodged in the sound legal discretion of an impartial judge, commissioned by the law of the land and the inherent sense of the responsibility of his high office "to do what to justice appertains." He hears the witnesses and observes their mental leanings or bias toward the question involved. He senses the atmosphere of the case. Moreover it would doubtless be a dangerous experiment to undertake by a judicial decree of an appellate court to prescribe a legal straitjacket for such matters.

Exercising the power delegated by statute and supported in principle by the decisions of this State, the hearing judge found certain facts and set them forth in his judgment. The last inquiry in the solution of the appeal is: What is the effect of the findings of fact set out in the judgment? Whatever may be the vari-

able conclusions reached by other courts, that inquiry is settled in North Carolina. The law is thus stated: "The findings of fact made by the judge of the Superior Court, found as they are upon competent evidence, are also conclusive on us, and we must therefore base our judgment upon his findings, which amply sustain his odrer." *In re Hamilton,* 182 N. C. 44, 108 S. E. 385. See, also, *Clegg* v. *Clegg,* 186 N. C. 28, 118 S. E. 824; *In re Hayes,* 200 N. C. 133, 156 S. E. 791.

It is true that the judge made certain remarks appearing in the record tending to show that he was undertaking to view the case from the standpoint of guilt or innocence or the ultimate probability of acquittal upon trial in the demanding state If these remarks had been incorporated into the judgment itself, a wholly different factual situation would be presented upon the appeal, but the judge expressly declared in the judgment as signed that he found as a fact "that he (prisoner) is not a fugitive from justice from the State of South Carolina, and was not present at the time of the commission of the alleged crime at Greenville, South Carolina." The judgment as written and signed speaks the mind of the judge and his conclusion upon the matters in issue. Therefore, the judgment as rendered must stand.

Affirmed.